IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977

No. 77-249

LARRY STEVEN JOHANSEN,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

BRIEF FOR RESPONDENT IN OPPOSITION

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I.

OPINION BELOW

The Petition correctly sets forth the order below and the absence of an opinion therein.

II.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

III.

QUESTIONS PRESENTED

1. IS A JURY COMPETENT TO RULE ON COMMUNITY STANDARDS IN AN OBSCENITY CASE BASED ON THEIR OWN KNOWLEDGE OF THE VIEWS OF THE AVERAGE PERSON IN THEIR COMMUNITY WHERE THEY ARE INSTRUCTED TO MAKE AN OBJECTIVE DETERMINATION BASED ON A STATEWIDE STANDARD, HAVE THE ALLEGEDLY OBSCENE FILMS IN EVIDENCE, AND THE BENEFIT OF SURVEYS OF STATEWIDE OPINION PRESENTED BY EACH SIDE?
2. IS A DEFENDANT ENTITLED TO A REVERSAL AS A MATTER OF DUE PROCESS BASED ON THE IMPLIEDLY UNCREDITED CLAIM OF A DISGRUNTLED JUROR THAT CERTAIN OTHER JURORS, ACTING ON THEIR OWN, VIOLATED TRIAL COURT ADMONITIONS RELATING TO PREMATURE DISCUSSION OF THE CASE AMONG THEMSELVES AND RELATING TO AVOIDANCE OF NEWS AND COMMENT CONCERNING OBSCENITY IN GENERAL AND A PUBLICIZED SEX CASE NOT RELATED TO THE FACTS HEREIN?
3. MAY A SEARCH WARRANT FOR THE SEIZURE OF ALLEGEDLY OBSCENE FILM BE EXECUTED ON THE BASIS OF A PREVIOUS EX PARTE JUDICIAL DETERMINATION WHERE STATE LAW (1) REQUIRES THE PROSECUTION TO FIRST SHOW PROBABLE CAUSE THAT PRESUMPTIVELY PROTECTED FILMS ARE OBSCENE BY AN AFFIDAVIT

WHICH FOCUSES SEARCHINGLY ON THE QUESTION OF OBSCENTIY AND (2) PROVIDES THE OWNER WITH, INTER ALIA, A MOTION FOR A PROMPT PRE-TRIAL ADVERSARY PROCEEDING TO REVIEW SUCH DETERMINATION?

IV.

CONSTITUTIONS AND STATUTES INVOLVED

The Constitutional provisions are adequately set forth in the petition except as to the following set forth in pertinent part:

"AMENDMENT XXI

Repeal of Prohibition

"Repeal of 18th Amendment

* * *

"Control of Interstate Liquor Transportation

"Sec. 2. The transportation or imposition into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

* * *

Cal.Pen. Code § 1525. Issuance; probable cause; supporting affidavits

"A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property and place to be searched."

Cal. Pen. Code § 1526. Issuance; examination of complainant and witnesses; taking and subscribing affidavits; transcribed statements in lieu of written affidavit

"(a) The magistrate may, before issuing the warrant, examine on oath the person seeking the warrant and any witnesses he may produce, and must take his affidavit or their affidavits in writing, and cause same to be subscribed by the party or parties making same.

"(b) In lieu of the written affidavit required in subdivision (a), the magistrate may take an oral statement under oath which shall be recorded and transcribed. The transcribed statement shall be deemed to be an affidavit for the purposes of this chapter. In such cases, the recording of the sworn oral statement and the transcribed statement shall be certified by the magistrate receiving it and shall be filed with the clerk of the court. In the alternative in such cases, the sworn oral statement shall be recorded by a certified court reporter and the transcript of the statement shall be certified by the reporter, after which the magistrate receiving it shall certify the transcript which shall be filed with the clerk of the court."

Cal. Pen. Code § 1536. Disposition of property taken; retention subject to order of court in which offense triable

"All property or things taken on a warrant must be retained by the officer in his custody, subject to the order of the court to which he is required to return the proceedings before him, or of any other court in which the offense in respect to which the property or things taken is triable."

Cal. Pen. Code § 1538.5. Motion to return property or suppress evidence

(a) Grounds

"(a) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on * * either of the following grounds:

"(1) The search or seizure without a warrant was unreasonable

"(2) The search or seizure with a warrant was unreasonable because (i) the warrant is insufficient on its face; (ii) the property or evidence obtained is not that described in the warrant; (iii) there was not probable cause for the issuance of the warrant; (iv) the method of execution of the warrant violated federal or state

constitutional standards; or (v) there was any other violation of federal or state constitutional standards."

* * *

Cal. Pen. Code § 1539. Traverse of grounds for issuance; testimony; depositions

"(a) If a special hearing be held in the superior court pursuant to Section 1538.5, or if the grounds on which the warrant was issued be controverted and a motion to return property be made (i) by a defendant on grounds not covered by Section 1538.5; (ii) by a defendant whose property has not been offered or will not be offered as evidence against him; or (iii) by a person who is not a defendant in a criminal action at the time the hearing is held, the judge or magistrate must proceed to take testimony in relation thereto, and the testimony of each witness must be reduced to writing and authenticated by a shorthand reporter in the manner prescribed in Section 869."

* * *

Cal. Pen. Code § 1540. Restoration of property; property not described in warrant; no probable cause.

PROPERTY, WHEN TO BE RESTORED TO PERSON FROM WHOM IT WAS TAKEN.

"If it appears that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate must cause it to be restored to the person from whom it was taken."

V.

STATEMENT OF THE CASE

Clyde's beer bar is a building located on Imperial Highway emblazoned with signs advertising "Adult Movies, Semi-Nude, Beer", "Open 11 a.m. - 2 a.m.", "Clyde's, Adult Movies". (R.T. 254-255.)[1/] Inside is a bar and rows of chairs facing a stage. (R.T. 264.) Over the stage is a screen upon which two self-winding projectors mounted next to the ceiling alternate in showing, spliced-together segments of sexually explicit films (found obscene below). (R.T. 265-266.) The patrons were male, the only women being barmaids and dancers. (R.T. 265.) Beer was served (R.T. 268), the premises being licensed to serve beer (R.T. 257).

On December 8, 1975 (R.T. 262), undercover sheriff deputies entered Clyde's,

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1. R.T. refers to Reporter's Transcript.

ordered beer, and watched the entire sequence of film (nine segments, some of which were untitled), each deputy in turn visiting the restroom to write down titles and the sequence after he had seen approximately two segments, so that between them all nine segments were described (R.T. 268-269).

Based thereon (R.T. 270-271) the deputies sought and procured a search warrant specifically describing the films (R.T. 270-271) from the Honorable Herbert J. Adden, Judge (Petition at 4) who had himself observed the film supporting all nine counts in their entirety prior to issuance of the warrant (Docket M-106377, p. 1).

Appellant was the manager of the premises (R.T. 278).

On December 10, 1975 a complaint was filed charging petitioner with nine counts of violation of Penal Code section 311.2 (exhibition of obscene matter) (Docket p. 1). On December 19, 1975 appellant, represented by counsel, was arraigned and noticed a motion pursuant to Penal Code section 1538.5 (Docket p. 1) which was set for January 19, 1976 (no objection being noted in the docket (Docket p. 1). On January 21, 1976 the motion was heard and denied

(Docket p. 2).

On January 21, 1976 jury trial commenced, being concluded with a guilty verdict against petitioner on February 11, 1976. (Docket pp 2-7.)

Deputy Kenealy testified that he had specialized in obscenity investigation for the past six and one-half years (R.T. 318), including undercover work (R.T. 318), that he had viewed and considered 2,000 hours of pornographic films, 3,000 pornographic magazines, and 500 hours of pornographic live conduct performances (R.T. 319), that he had attended three seminars on the subject, speaking at the last one (R.T. 317), that he had lectured on the subject to civic groups 150 to 175 times (R.T. 318), was an advisor on the subject to four official agencies (local, state, and national) (R.T. 319), had taken a college course in the technical aspects of research methodology given by Dr. Knowles at U.S.C. (R.T. 324) and had received special tutoring on introduction in the area of surveying techniques given by Drs. Krasner and Adleman at Pepperdine College (R.T. 325).

The most recent statewide survey in which he participated involved survey questionnaires formulated with the

assistance of Drs. Adleman and Krasner of Pepperdine College (R.T. 325). Five thousand surveys were distributed in all 58 California counties (R.T. 331) in their most populated cities and in other cities selected at random (R.T. 326) with 1,444 surveys being completed and returned (R.T. 332). This compares with 1,500 surveys used by the Gallop poll for a national survey (R.T. 332-333). The returned surveys were tabulated and analyzed by Drs. Adleman and Krasner (R.T. 325-326).

Each of the films were described to Deputy Kenealy, who based on his background and having seen them, gave his opinion as to each that they were each obscene (R.T. 363-370). Kenealy also testified that on projector number one (including 4 segments) he counted 40 separate acts of coitus, i.e., one every one and one-fifth minute (R.T. 381-382) and on projector number two (including 5 segments) there were 43 acts depicted, i.e., one every one and one-fifth minute (R.T. 382). In addition to coitus, other graphically depicted sexual acts appeared. For example, in "Roof Top Rape" there were 63-plus such acts over the ten-minute length of the film, i.e., one approximately every nine and three-fifth seconds

(R.T. 378-379). In the eleven-minute film "Two Crooks Meet A Hot Job" there were ten scenes of coitus, three of masturbation, two of ejaculation, eleven of fellatio, seven of cunnilingus, one of sucking of the breast, five of fondling the breast, one of fondling of the penis, two of fondling of the vagina, for a total of 42 acts, plus the continuous troilism, i.e., graphically depicted sexual act every six and two-fifth seconds. (R.T. 380-381.)

VI.

ARGUMENT

A

A JURY IS COMPETENT TO RULE ON COMMUNITY STANDARDS IN AN OBSCENITY CASE BASED ON THEIR OWN KNOWLEDGE OF THE VIEWS OF THE AVERAGE PERSON IN THEIR COMMUNITY WHERE THEY ARE INSTRUCTED TO MAKE AN OBJECTIVE DETERMINATION BASED ON A STATE-WIDE STANDARD, HAVE THE ALLEGEDLY OBSCENE FILMS IN EVIDENCE, AND THE BENEFIT OF SURVEYS OF STATEWIDE OPINION PRESENTED BY EACH SIDE

Expert testimony as to community standards is no longer required, either as a matter of constitutional law (Hamling v. United States, 418 U.S. 87, 41 L.Ed.2d

590, 94 S.Ct. 2887, 2901; Paris Adult Theatre I v. Slaton, 413 U.S. 49, 56, 93 S.Ct. 2628, 2634, 37 L.Ed.2d 446 [1973]) nor as a matter of California law (Penal Code section 311.2; People v. Enskat, 33 Cal. App.3d 900, 914). The juror is entitled to draw on his own knowledge of community standards (which is comparable to his knowledge of the propensities of a "reasonable" person in other areas of the law) (Hamling, supra at 94 S.Ct. 2901). The constitutional concern is not one of geography, but merely that the jury be instructed to "consider the entire community [however defined geographically] and not simply their own subjective reactions, or the reactions of a sensitive or of a callous minority" (Smith v. United States [1977] ___U.S.___, 52 L.Ed.2d 324, 338; 97 S.Ct. 1756, 1766; see also Miller v. California [1973] 413 U.S. 15, 33; 93 S.Ct. 2607, 2620; 37 L.Ed.2d 419 ["impact on an average person"]). Such instructions are subject to review (Smith, supra at 93 S.Ct. 1766). Here the jury was instructed (1) not to use subjective personal standards but inter alia to make an "objective" determination of what is "acceptable to the community as a whole" and (2) to use a statewide standard. (Modified

CALJIC 16.186 [given] [attached as Appendix A].)

Furthermore, the jury could consider the California obscenity statute (which fails to provide a separate standard for "consenting adults" although it does for "clearly defined deviant sexual groups" [see Penal Code section 311(a)[1]) as "relevant evidence of the mores of the community whose legislative body enacted the law" (Smith, supra at 97 S.Ct. 1767).

The films (as hard core pornography) speak for themselves (Enskat, supra at 914; Paris Adult Theatre I, supra at 413 U.S. 56, 93 S.Ct. 2634, n. 6) and their placement in evidence herein removed the necessity for expert testimony (Paris Adult Theatre, supra at 413 U.S. 56, 93 S.Ct. 2634).

Thus the sufficiency of the expert testimony becomes an academic question, since even if insufficient, we must then assume in support of the judgment that the jury disregarded it (Hamling, supra at 94 S.Ct. 2911) as they are entitled to do (Enskat, supra at 914-915).

As to the expert testimony introduced concerning community standards, the prosecution survey covered 58 counties while the defense survey covered only 20. (R.T. 325,

697-698, 754.) The prosecution survey, although conducted by the sheriff's office, was prepared by Dr. Adleman (in collaboration with Dr. Krasner) who concededly concluded that it was a valid survey (R.T. 775). Dr. Fitche's survey (used by the defense) was concededly not perfect (R.T. 775). The criticisms of the prosecution survey leveled by the defense as to tabulation of returns, demographic data, and formulation of questions were ably answered in the prosecution's closing argument (R.T. 777-780), here incorporated by reference. (Cf. Miller v. California, supra at 413 U.S. 31, 93 S.Ct. 2619, n. 12.)

B

DEFENDANT IS NOT ENTITLED TO A REVERSAL AS A MATTER OF DUE PROCESS BASED ON THE IMPLIEDLY UNCREDITED CLAIM OF A DISGRUNTLED JUROR THAT CERTAIN OTHER JURORS, ACTING ON THEIR OWN, VIOLATED TRIAL COURT ADMONITIONS RELATING TO PREMATURE DISCUSSION OF THE CASE AMONG THEMSELVES AND RELATING TO AVOIDANCE OF NEWS AND COMMENT CONCERNING OBSCENITY IN GENERAL AND A PUBLICIZED SEX CASE NOT RELATED TO THE FACTS HEREIN

A juror's "second thoughts" about his verdict is not, of course, a sufficient basis in law or fact on which to predicate a new trial (see Penal Code section 1181; Witkin, California Criminal Procedure [1963 ed.] and 1975 Supp., § 570; People v. Orchard [1971] 17 Cal.App.3d 568, 573).[2] Thus admission of jurors' declarations only as to objective facts and not as to subjective reasoning processes "protects the stability of verdicts" (People v. Hutchinson [1964] 71 Cal.2d 342, 350).

Both the Buergey declaration and Deputy Raff's report of a subsequent interview with Buergey were, by agreement of the parties, considered by the trial court (E.S.S.A. p. 4, lines 11-13). Together and even in themselves they give rise to conflicting inferences. "Under these circumstances, we

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2. Significantly, the complaining juror (Beurgey) has apparently repudiated his "second thoughts" and now feels that justice had been served and that the verdict was a proper one (Engrossed Settled Statement on Appeal [hereinafter referred to as E.S.S.A.] Exhibit 2, p. 2). Hence his verdict today would be guilty and the result would not have changed. It should be noted that Deputy Raffa's report (E.S.S.A., Exhibit 2) was stipulated to be admissible (E.S.S.A., p. 4, lines 11-13).

are bound by the lower court's implied factual finding" (People v. Brown [1976] 61 Cal.App.3d 476, 483), i.e., that there was no showing of jury misconduct and that Buergey was essentially indulging in second thoughts (E.S.S.A. p. 4, lines 13-18, 22-26). The conflicting inferences arise from Buergey's own internal conflicts (regretting that he "was swayed so easily" and feeling that a polygraph "would also help me in determining what's really in my mind too" [E.S.S.A. Exhibit 1, p. 3]) and his conflicts with the rest of the jury whom he terms a "clique" and these "chosen few" (E.S.S.A. Exhibit 1, p. 2). He had admittedly told the majority that whatever they might decide "when they were finished, I would then hang that jury" and later pushed his chair away from the table (E.S.S.A. Exhibit 1, p. 2). The tone of the Buergey letter alternates between self-righteousness and pangs of conscience.

Although the foregoing factors are all subjective they effect Buergey's credibility (and perception) as to the "objective" statements which occasionally intrude into his otherwise subjective discourse. When he indicates that two of the women jurors had expressed views that defendants were guilty

before the beginning of deliberations, he is expressing a conclusion based on his (biased) interpretation of what those jurors actually said (or intended). Such a conclusion (lacking an exact quote) was properly given little evidentiary weight (cf. People v. Henderson [1947] 79 Cal.App.2d 94, 123). It also seems to enter into the subjective reasoning processes of the women jurors (perhaps indicating a tentative conclusion, or hypothesis) as to which Buergey's declaration is not competent evidence (People v. Hutchinson [1945] 71 Cal.2d 342, 350).

The alleged statement attributed to juror Duffy that he read the L.A. Times article in spite of the court's instructions is hearsay presumably covered by the prosecution's initial objection to competent evidence (E.S.S.A. p. 4, line 5) apparently never withdrawn as to specific matter in the Buergey declaration (cf. E.S.S.A. p. 4, lines 11-13). In any case it was properly given little weight since Duffy could well have been kidding a naive Buergey along and there is no indication that the news article had any relevance to the instant case. (Contrast People v. Lessard [1962] 58 Cal.2d 447, and People v. Wong Loung [1911] 159 Cal. 520, cited by appellant, which dealt

with articles about the case under consideration.)

As to the alleged failure to obey the court's admonition to refrain from discussing the case (or such cases as the Maurice Weiner sex trial), "[g]eneral discussion of the jurors during recess, while not to be approved, could not, as a matter of law, be prejudicial" (People v. Henderson [1947] 79 Cal.App.2d 94, 123).

Finally, as to alleged harrassment by his fellow jurors the trial court found that Buergey was not intimidated (E.S.S.A. p. 4, line 17). This finding was supported by Buergey's description of his threats to hang the jury, his pushing his chair away from the table, his announcement to the other jurors "that it would do no good to vote on this subject and one way or another, we would return to this subject" (E.S.S.A. Exh. 1, p. 2). At one place Buergey describes his guilty vote as being somewhat premature due to the fact that "I didn't think of the other two points of law until the jury was excused and I was leaving the courthouse" (E.S.S.A. Exh. 1, p. 2.) Nevertheless, despite these second thoughts, Buergey is apparently now of the opinion that justice was served and that the verdict was proper (E.S.S.A. Exh. 2

p. 2). It follows that as to Buergey's own subjective thought processes, the appellants were not prejudiced. As noted in People v. Orchard (1971) 17 Cal.App.3d 568, 574, "[j]urors may be expected to disagree during deliberations, even at times in heated fashion". Thus, "[t]o permit inquiry as to the validity of a verdict based upon the demeanor, eccentricities, or personalities of individual jurors would deprive the jury room of its inherent quality of free expression" (id. at 574).

Unlike Turner v. Louisana (1965) 379 U.S. 466, 13 L.Ed.2d 424, 85 S.Ct. 546 (involving a state practice of allowing deputy sheriffs to serve both as witnesses and jury custodians) where as here no procedure adopted by the State is to be faulted, the rule of Stroble v. California (1951) 343 U.S. 18 , 96 L.Ed. 872, 72 S.Ct. 599, and Irvin v. Doud (1961) 366 U.S. 717, 6 L.Ed. 2d 751, 81 S.Ct. 1639, should be applied, requiring a substantial showing of prejudice in fact before a due process violation can be found. (See Harlan dissent in Parker v. Gladden [1966] 385 U.S. 363, 17 L.Ed.2d 420, 87 S.Ct. 468, at 385 U.S. 368, 17 L.Ed.2d 425 [court bailiff assigned to sheperd sequestered jury makes statements to jurors

urging conviction which are found by trial court to be prejudicial].)

As this Court has pointed out, Turner v. Louisiana [1964] 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424, ". . . did not set down a rigid, per se rule automatically requiring the reversal of any conviction whenever any Governmental witness comes into any contact with the jury" (Gonzales v. Beto [1972] 405 U.S. 1052, 1054; 31 L.Ed.2d 787; 92 S.Ct. 1503, 1504-1505). Here, unlike Turner (where the jury custodians also served as vital prosecution witnesses in the same case) there is no indication that any outside information which certain jurors received on their own either directly pertained to the case at bar or necessarily favored the prosecution (other than merely opposing obscenity, the illegality of which is presupposed in the trial proceeding itself).

C

A SEARCH WARRANT FOR THE SEIZURE OF ALLEGEDLY OBSCENE FILM MAY BE EXECUTED ON THE BASIS OF A PREVIOUS EX PARTE JUDICIAL DETERMINATION WHERE STATE LAW (1) REQUIRES THE PROSECUTION TO FIRST SHOW PROBABLE CAUSE THAT PRESUMPTIVELY PROTECTED FILMS ARE OBSCENE BY AN AFFIDAVIT WHICH FOCUSES SEARCHINGLY ON THE QUESTION OF OBSCENITY AND (2) PROVIDES THE OWNER WITH, INTER ALIA, A MOTION FOR A PROMPT PRE-TRIAL ADVERSARY PROCEEDING TO REVIEW SUCH DETERMINATION

1.) Petitioner contends that California provision of "a full hearing on the question of the lack of probable cause for the issuance of a seizure warrant for reasons of free speech violations" (Monica Theater v. Municipal Court [1970] 9 Cal. App.3d 1, 9) somehow falls short of the constitutional requirement, following seizure, of "a prompt judicial determination of the obscenity issue in an adversary proceeding...available at the request of any interested party." (Heller v. New York [1973] 413 U.S. 482, 93 S.Ct. 2789, 2795.)

Petitioner thus confuses a standard of proof ("probable cause") with an issue to be

determined ("obscenity").

In Heller, this Court carefully distinguished judicial procedures requisite to imposition of a "final restraint" upon films (e.g. injunctions against exhibition, seizures to destroy them or block their exhibition) from procedures requisite to the seizure of "a single copy of a film for the bona fide purpose of preserving it as evidence in a criminal proceeding, particularly where... there is no showing or pretrial claim that the seizure of the copy prevented continuing exhibition of the film." (Id. at 413 U.S. 490, 492; 93 S.Ct. 2793, 2794-2795.) While the former situation raises the First Amendment specter of "prior restraint", the latter seems to presuppose no prior restraint and thus reduces essentially (at this point) to a Fourth Amendment issue.

Thus, a prior judicial (albeit ex parte) determination of probable cause (the search warrant requirement) "will protect against gross abuses", while "the availability of a prompt judicial determination in an adversary proceeding following the seizure assures that difficult marginal cases will be fully considered in light of First Amendment guarantees, with only a minimal interference with public circulation

pending litigation." (Id. at 413 U.S. 493, 93 S.Ct. 2795 [emphasis added].) It is, of course, the adversary feature which assures full consideration of difficult marginal cases--not the standard of proof. As a California intermediate appellate court points out, "[w]e have no concern here with the final determination as to the obscene nature of the films; even a prior adversary hearing before the issuing magistrate [which Heller found unnecessary] establishes no more than probable cause and does not establish obscenity itself or there would be no need for a trial." (People v. Sarnblad [1972] 26 Cal.App.3d 801, 807.)

In addition to (1) "an ex parte determination of the issue of obscenity, so far as probable cause is concerned... before issuance of the warrant," and (2) "immediately after the seizure a determination of the issue to that extent...in adversary proceedings by controverting the warrant under sections 1539 and 1540 of the Penal Code" (Aday v. Superior Court [1961] 55 Cal.2d 789, 799), California also provides (3) "by means of a section 1538.5 motion, a very prompt adversary judicial proceeding" (Monica Theater, supra at 9 Cal.App.3d 14), (4) "a nonstatutory

motion for release of property seized under a search warrant" (Loar, supra at 28 Cal. App.3d 609; see Buker v. Superior Court [1972] 25 Cal.App.3d 1085, 1089), and (5) "a pretrial on-the-merits consideration of the character of the involved material (obscene or not obscene)" on defense motion. (Monica Theater, supra at 9, n. 7; see Zeitlin v. Arnebergh [1963] 59 Cal.2d 901, 904, 908-911 [declaratory relief]; People v. Noroff [1967] 67 Cal.2d 791, 793; Aday v. Municipal Court [1962] 210 Cal.App.2d 229, 244.)

Furthermore, (6) "the state must initiate proceedings leading to a final judicial determination on the question whether the materials are protected within a reasonable period compatible with sound judicial administration" with "the burden of [proof] ...borne by the state." (Loar, supra at 28 Cal.App.3d 620.) Otherwise, (7) "other remedies such as mandamus will be available to secure return of the property." (Aday v. Superior Court, supra at 55 Cal. 789, 799.)

2.) Petitioner contends that California law does not (as to search and seizure) place the burden of establishing obscenity on the prosecution. Not so. Under

California law "[a] search warrant cannot be issued but upon probable cause, supported by affidavit." (California Penal Code section 1525.)

The term "probable cause" refers to a standard of proof (not an issue to be determined such as obscenity, exhibition, etc.). "Probable cause" is approximately the same as "preponderance of the evidence" (see People v. Ingle [1960] 53 Cal.2d 407, 413), the standard that would prevail in a civil case as for an injunction.

In addition, California law recognizes that purported obscenity is "presumptively" protected by the First Amendment (People v. Superior Court [Loar] [1972] 28 Cal.App.3d 600, 615 [emphasis added]) and, until judicially determined otherwise, "cannot be treated in the same manner as contraband... for purposes of search and seizure." (Flack v. Municipal Court [1967] 66 Cal.2d 981, 989-990, 990.) This requires "a judicial determination that there is probable cause to believe the material falls outside the constitutional protection." (People v. Superior Court [Freeman] [1975]

14 Cal.3d 82, 90.)[3/] The California Supreme Court further recognizes that "...the requirement of probable cause is especially important where...freedom of speech and press is involved, and great caution must be exercised before permitting the seizure of books on the ground of obscenity." (Aday v. Superior Court [1961] 55 Cal.2d 789, 797.) Thus, under California decisional law "affidavits submitted to the magistrate in support of a request for a seizure warrant can be [i.e., in order to meet constitutional requirements] composed in a manner to

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3. This refers to probable cause to believe the materials obscene under California law, i.e., the standard tripartite test (Monica Theater v. Municipal Court [1970] 9 Cal.App.3d 1, 8-9, n. 6) "limited to the patently offensive representations or descriptions of the specific 'hard-core' sexual conduct given as examples in Miller I. [Miller v. California (1973) 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607], i.e., 'ultimate sexual acts, normal or perverted, actual or simulated,' and 'masturbation, excretory functions, and lewd exhibitions of the genitals' (413 U.S. at p. 25 [37 L.Ed.2d at p. 431].)" (Bloom v. Municipal Court [1976] 16 Cal.3d 71, 81.) The California obscenity statute as authoritatively construed was specifically upheld in Hicks v. Miranda (1975) 422 U.S. 332, 45 L.Ed.2d 223, 95 S.Ct. 2281, and Miller v. California (II) (1974) 418 U.S. 915, 41 L.Ed.2d 1158, 94 S.Ct. 3206.)

focus searchingly on the question of obscenity." (Monica Theater v. Municipal Court [1970] 9 Cal.App.3d 1, 16.) Therefore, the existence of the warrant indicates that the People had already successfully satisfied their burden in procuring its issuance.

Although, after the warrant has issued the defendant-owner becomes the moving party in seeking to suppress the evidence or its return (id. at 9), "[t]he burden is upon him to make a prima facie case that the material is not obscene and hence not subject to seizure [citation omitted]. Once he has done so, the burden shifts to the state to establish that the material is in fact obscene." (People v. Bonanza Printing Co. [1969] 271 Cal.App.2d Supp. 871, 874.) The People's burden on a Penal Code section 1538.5 motion is a preponderance of the evidence. (People v. Stafford [1972] 28 Cal.App.3d 405, 412; citing People v. Superior Court [Bowman] [1971] 18 Cal.App.3d 316, 321.)

Contrary to petitioner, Heller v. New York (1973) 413 U.S. 483, 37 L.Ed.2d 745, 93 S.Ct. 2789, does not require that the People bear the burden of proof at the post-seizure adversary hearing. (Id.

at 93 S.Ct. 2794-2795.)

3.) "The setting of the bookstore or the commercial theater [is] each presumptively under the protection of the First Amendment warrant requirements" (Roaden v. Kentucky [1973] 413 U.S. 496, 504-505, 37 L.Ed.2d 757, 764-765, 93 S.Ct. 2796.) However, a setting such as a licensed bar or nightclub (as here) invokes that state regulatory interests protected by the Twenty-first Amendment, no less part of the federal Constitution, wherein the state regulatory authority is not "limited to either dealing with the problem it confronted within the limits of our decisions as to obscenity, or in accordance with the limits prescribed for dealing with some forms of communicative conduct in O'Brien, supra," (California v. La Rue [1972] 409 U.S. 109, 116, 34 L.Ed.2d 342, 351, 93 S.Ct. 390.) The setting herein is of the latter description.

CONCLUSION

For the reasons stated above, the Petition should be denied.

Respectfully submitted,

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MODIFIED COPY OF CALJIC 16.186

OBSCENITY -- "CONTEMPORARY COMMUNITY STANDARDS" -- DEFINED

Requested by People		Given as Requested	✓	Refused	
Requested by Defendant		Given as Modified		Withdrawn	
		Given on Court's own Motion			

Judge

16.186

The contemporary community standard referred to in these instructions is set by what is, in fact, acceptable to the community as a whole, not by what some person or persons may believe the community as a whole ought to accept. Ascertainment of the standard must be based upon an objective determination of what affronts, and is unacceptable to, the community as a whole. Your own personal, social or moral views on material such as that charged in the complaint may not be considered.

For the purposes of determining the obscenity of the material here in question the controlling community is the entire State of California.